# The Employment Contract and the European Union, an impossible harmonisation conundrum

(Credit: DR)

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**A recent judgment of the *Cour de Cassation* (French Supreme Court) upends the law on employment contracts within Europe, potentially threatening to create considerable legal uncertainty for transnational companies. By Ombeline Degreze-Pechade, attorney at law, member of the Paris Bar**

In recent months, much discussion and debate in the press have been focused on the court decisions handed out against the companies Ryanair and CityJet, which have been ordered to pay damages to the *Caisses de Sécurité Sociale Françaises* (French Social Security Fund Schemes) and face criminal prosecution on undeclared labour-related charges.

A recent ruling handed down by the French Supreme Court dated 29 September, 2014 may well be of interest to such airline companies as well as, more generally, to any European company wishing to employ workers in France.

## A French national employed subject to Spanish law ...

This case involved a company based in Spain, which hired one of its r employees, who was a French national and working in France, under an employment contract that was subject to Spanish law and to the jurisdiction of the courts in Lleida, Spain. After five years, the employee had to be laid-off for economic reasons.

However, under the French labour code, work that is usually undertaken and carried out in France is required to be subject to French law and falls under the jurisdiction of the *Conseil des Prud'hommes* (French Labour Courts).

However, the Spanish employer had obtained an administrative authorisation from the social security agencies in Spain permitting the employee to be hired pursuant to Spanish law under the terms and context of a temporary work assignment in France.

Thus it was only pursuant to an administrative authorisation from the Spanish authorities that the employer hired the employee under a contract subject to Spanish law and to the jurisdiction of the Spanish courts, conditions which had been agreed to by the employee.

## ... However, the dispute was brought before the French Labour Court

Unfortunately for the employer, the employee decided to take legal action in France, bringing the dispute before the French Labour Court. Subsequently, when the employer's reasoning was upheld by the Labour Court in the first instance proceedings, the employee took the matter before the Court of Appeal.

However, the Court of Justice of the European Union had held in a ruling dated 26 January 2006 - based on the EU Regulation of 14 June 1971 on the application of social security schemes in the European Union – that as long as the certificates of authorisation issued by the administrative decision-making authority had not been withdrawn by the same authority, the courts of the host country were not empowered to challenge this authorisation. In summary, each remains master of his domain.

This is also the position taken by the German Federal Court of Justice which ruled in a judgement handed down on 24 October 2006, that such a certificate of authorisation shall be binding on the criminal courts.

However, the French Supreme Court did not view the issues in quite the same light. It has recently ruled in its judgment of 29 September 2014, which is due to be published and expected to set a legal precedent, that this reasoning has effect only in respect of social security matters.

The recent French supreme court decision is thus in contradiction with the relevant European regulation and the case law of the Court of Justice of the European Union, as well as with the German Federal Court of Justice, in requiring the same employment contract be subject to different laws and Courts.

## Legal uncertainty reigns

For concerned companies, corporate existence will not get any simpler. An employment contract may cumulatively fall under French law and the jurisdiction of French courts insofar as the application of labour laws goes, whereas Spanish law and the jurisdiction of the Spanish courts may apply in respect of Social Security.

It's a safe bet that legal uncertainty will reign. Already one can anticipate the many questions likely to be raised as to what might happen in matters that touch upon both labour law and social security entitlements, for example, compensatory claims made by employees who are laid-off after an extended period of sick leave, or the calculation of compensation to be paid by the employer and the *Caisses d'Assurance Maladie* (Health Insurance Fund Schemes).

## Undermining the free movement of workers

Beyond the legal considerations, this decision calls into question the principle of free movement of workers and services within the European Union. Which employer would willingly agree to submit to such a complex system with the potential risk of the law applicable to the employment contract being open to challenge several years later?

Nonetheless, the point of interest of this decision lies in the fact that, conversely, it has been decided for the first time, that if employers hold an authorisation providing for them to be subject to the social security regime of a Member State, then the social security benefits duly paid out under that regime may not be called into question.

It consequently follows that, if an employer is able to adduce evidence of being compliant and in good standing with administrative authorities in his country of origin in respect of his social security obligations, no compensatory payments shall be due to the French social security fund schemes and there will be no arguable grounds for any undeclared labour-related criminal prosecution.

Note: The author of this article has represented the employer in the proceedings in question.